HOW THE SUPREME COURT MAY VIEW THE FAIR LABOR STANDARDS ACT*

INTRODUCTION

The subject to be discussed in this article is the constitutionality of the Fair Labor Standards Act. Constitutionality is not the kind of thing, however, which may be determined *in vacuo* merely by an examination of the statute and the Constitution. Nor can it be discovered entirely through a reading of judicial decisions. As we all know, the Constitution and the cases mean different things to different people, and the constitutionality of a law ultimately depends upon what the Constitution means to the people who are the ultimate arbiters—the justices of the Supreme Court. The constitutionality of the Fair Labor Standards Act thus will be determined by what the justices who will pass upon the question think the Constitution means.

The task of the lawyer in advising clients as to the validity of the Fair Labor Standards Act is to predict what the Supreme Court justices will say about it. The lawyer customarily states his views as to what "the Court" will hold. Since in this case it is quite unlikely that the members of the Court will all come to the same conclusion,[1] he might more appropriately conjecture as to what the justices are likely to say on both sides of the question. Then all that need be done is to guess how many justices will subscribe to each opinion, and the question as to whether the Act is constitutional will be resolved.

The writers suggest that the following opinions might be written by members of the present Court. The opinion holding the Act valid has been prepared by Mr. Stern. The opinion holding the Act invalid has been prepared by Mr. Smethurst. Neither opinion is labeled here as "majority" or "minority." The fact that the opinion holding the Act constitutional comes first is not of significance in that respect.

* This article is composed of two parts, one written by Robert L. Stern and the other by R. S. Smethurst. The "Introduction" and "Statement of the Case" were prepared jointly by the two authors. Biographical data may be found in footnotes appended to the writers' names, *infra* at pp. 433 and 444.

[1] Apart from Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935), there have been from two to four dissenting votes in almost every important recent decision under the commerce and due process clauses. Railroad Retirement Board v. Alton R. R., 295 U. S. 330 (1935) (5-4); Carter v. Carter Coal Co., 298 U. S. 238 (1936) (5-4); Morehead v. People *ex rel.* Tipaldo, 298 U. S. 587 (1936) (5-4); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937) (5-4); Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608 (1937) (5-4); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937) (5-4); Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 (1937) (5-4); Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453 (1938) (5-2); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938) (6-2); Currin v. Wallace, 59 Sup. Ct. 379 (1939) (6-2); Mulford v. Smith, 59 Sup. Ct. 648 (1939) (6-2); National Labor Relations Board v. Fainblatt, 59 Sup. Ct. 668 (1939) (6-2); United States v. Rock Royal Co-operative, Inc., 59 Sup. Ct. 993 (1939) (5-4).

The following statement of the case may be read as the introduction to each opinion.

STATEMENT OF THE CASE

Appellee was indicted by a grand jury in the Northern District of Pennsylvania for violating Subsections (1), (2) and (4) of Section 15(a) of the Fair Labor Standards Act of 1938. A demurrer to the indictment on the ground that those provisions of the statute were unconstitutional was sustained by the District Court. The case comes here on direct appeal under the Criminal Appeals Act.

The indictment alleges that appellee is a manufacturer of women's garments. He employs three hundred persons in his factory. Eighty per cent of the garments produced in January 1939 were bought by and shipped to purchasers outside the State of Pennsylvania. In the sale of such products appellee competes with many other factories in Pennsylvania and other states. During the month of January, 1939 some of the persons employed by appellee (both men and women) were paid eighteen cents an hour and were required to work fifty-four hours a week without pay for overtime. These persons were employed both in manufacturing and clerical operations, some being sewing machine operators and others stenographers. Each machine operator worked on goods sent outside of the state. Appellee also employed in his factory in that month children under sixteen years of age.

The statute provides that no manufacturer shall pay to any of his employees engaged in commerce (defined as interstate commerce) or in the production of goods for commerce less than twenty-five cents per hour, or employ any such employee longer than forty-four hours a week without specified additional compensation for overtime. Sections 6 and 7.[2] A person who violates these provisions of the Act, or who ships or sells for shipment in commerce goods produced by employees employed in violation of the above provisions is subject to fine, or after a second conviction to imprisonment. Sections 15 and 16. The Act also prohibits the shipment in commerce of goods produced in any establishment wherein "oppressive child labor" has been employed during the thirty days preceding shipment. Section 12. Oppressive child labor is defined, *inter alia,* to mean the employment in factories of children under sixteen years of age. Section 3(l). Similar penalties are imposed for violation of this provision.

The indictment charges appellee, in separate counts, (a) with selling and shipping to other states garments produced by (1) sewing machine operators and (2) stenographers paid eighteen cents per hour; (b) with selling and shipping to other states garments produced by (1) sewing machine operators and (2) stenographers employed fifty-four hours per week without compensation for overtime; (c) with selling and shipping to persons in other states garments produced while appellee was employing in his factory children under sixteen years of age; (d) with paying (1) sewing machine operators and (2) stenographers engaged in the production of goods

[2] The minimum wages are to be increased and the maximum hours are to be decreased after the first year.